IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANNE DILL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CARL OSLICK,	:	
MICHAEL BARONE and	:	
RONALD ZAPPAN	:	**NO. 97-6753**

M E M O R A N D U M

WALDMAN, J. **July 19, 1999**

I. Background

This is one of eight cases arising from alleged assaults of female parole violators by a state parole investigator assigned to return them to state prison. Plaintiff has asserted against defendants Barone and Zappan claims under 42 U.S.C. §§ 1983, 1985 and 13981 and supplemental state-law claims for negligence and intentional infliction of emotional distress.

Presently before the court is the motion of defendants Barone and Zappan for summary judgment.

II. Legal Standard

In considering a motion for summary judgment, a court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc.

v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, but rather must present evidence from which a jury could reasonably find in his favor. Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise in the light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff was a parolee. On September 26, 1995, she was being returned to a state prison after violating the terms of her parole. Defendant Oslick, a retired Philadelphia police officer, was one of two parole investigators assigned to transport her back to prison. The other parole investigator so

assigned was Heriberto Sanchez.[1] Mr. Oslick is no longer employed by the Pennsylvania Board of Probation and Parole, having been terminated as a result of the events which form the basis of this action and the related cases. Mr. Barone is and was in 1995 the Board of Probation and Parole Northeast Unit Parole Supervisor. Mr. Barone was the supervisor for Messrs. Oslick and Sanchez. Mr. Zappan, currently retired, was in 1995 the Philadelphia Deputy District Director for the Board of Probation and Parole.

At the beginning of plaintiff's trip back to prison, she and the other parole violators, all of whom were women, were chained at the wrists and ankles to prevent them from moving. Mr. Oslick subsequently released plaintiff and the other women from their handcuffs. While driving the van to the state prison in which plaintiff was to be reincarcerated, Mr. Oslick began touching plaintiff's left leg. Plaintiff told Mr. Oslick at least twice to stop. Mr. Oslick told plaintiff she looked "good enough to eat," and asked plaintiff and another female parolee whether they were wearing brassieres. Both women told him that they were. Mr. Oslick asked if he could see their breasts. Both women told him that he could not.

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[1] Mr. Sanchez was originally named as a defendant but was dismissed as a party by stipulation of counsel on January 14, 1999.

Mr. Oslick stopped the van at a gas station to allow one of the other women to use a restroom. While parked, Mr. Oslick rubbed plaintiff's legs with his hands. He slid a hand under plaintiff's shorts and placed a finger in her vagina. Plaintiff moved away from Mr. Oslick and told him never to do that again. Mr. Oslick grabbed plaintiff's hand and placed it on his penis. Mr. Oslick told plaintiff that he wanted to have sexual relations with her but that "everything is not for everybody." Mr. Oslick gave plaintiff a note with his name and office telephone number and suggested that plaintiff telephone him.

The Board provided instruction to parole investigators on the proper methods of transporting prisoners and on its policy against sexual harassment generally. There is no evidence that parole investigators were specifically instructed not to molest or sexually assault prisoners in their custody.

The Board had a policy that, when possible, at least one agent transporting prisoners should be of the same gender as the prisoners. Because male agents outnumbered female agents by more than ten to one, however, it was often not possible to assign a female agent to female prisoners.

Mr. Oslick had been reprimanded in 1993 by then Deputy District Director Daniel Solla for an incident in which he told a male colleague to "kiss [his] ass" and then dropped his pants.

This occurred in the presence of several female coworkers and "clients," presumably parolees. Mr. Oslick's written reprimand warned that his conduct was "unprofessional and unacceptable" and that any such behavior in the future would result in more severe disciplinary action. Messrs. Barone and Zappan learned about this shortly thereafter. Harold Shalon, the District director, had received complaints from staff that Mr. Oslick was argumentative and a frequent complainer. Mr. Sanchez considered Mr. Oslick an occasionally annoying and argumentative co-worker with a bad attitude. He reported to Messrs. Barone and Zappan on one occasion, and possibly a second, prior to September 1995 that Mr. Oslick had told inappropriate sexually explicit jokes to female parolees.

Upon learning that Mr. Oslick may have inappropriately touched one or more of the female parolees entrusted to his custody, Mr. Shalon promptly initiated an inquiry on October 6, 1995 and referred the matter for investigation to the Office of Inspector General. The investigation was concluded and Mr. Oslick was terminated within ten weeks. It is uncontroverted that Messrs. Zappan and Barone had no knowledge that Mr. Oslick may have inappropriately touched a female prisoner before the initiation of the inquiry and disciplinary proceedings by Mr. Shalon in October 1995.

Plaintiff's claims against defendants Barone and Zappan are premised on their allegedly allowing Mr. Oslick to transport female parolees despite knowing of his propensity for engaging in sexually inappropriate conduct.

IV. Discussion

A. Immunity

1. Eleventh Amendment

Plaintiff asserts claims against defendants Barone and Zappan both in their official and individual capacities. The Eleventh Amendment bars citizen suits against unconsenting states in federal courts. See Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n of Com. of Pa., 141 F.3d 88, 91 (3d Cir. 1998). Pennsylvania does not consent to suit in federal court. See 42 Pa. C.S.A. § 8521(b). The Pennsylvania Board of Probation and Parole and its employees in their official capacities are an arm of the Commonwealth entitled to Eleventh Amendment immunity. See Powell v. Ridge, 1998 WL 804727, *8 (E.D. Pa. Nov. 19, 1998); Chladek v. Com. of Pa., 1998 WL 54345, *4 (E.D. Pa. Jan. 29, 1998); Canady v. Pennsylvania Bd. of Probation and Parole, 1988 WL 127690, *1 (E.D. Pa. Nov. 28, 1988); Ahmed v. Burke, 436 F. Supp. 1307, 1311 (E.D. Pa. 1977); Reiff v. Com. of Pa., 397 F. Supp. 345, 350 n.2 (E.D. Pa. 1975).

The only exceptions to Eleventh Amendment immunity occur when Congress has permissibly abrogated it or when state

officers are sued for prospective injunctive or declaratory relief. See Wheeling & Lake Erie Ry. Co., 141 F.3d at 91. Congress has not abrogated Eleventh Amendment immunity for any of plaintiff's federal claims. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989) (§ 1983); Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1035 (9th Cir. 1999); Fitzpatrick v. Com. of Pa., Dep't of Transp., 40 F. Supp. 2d 631, 635 (E.D. Pa. 1999); Rucker v. Higher Educ. Aid Bd., 669 F.2d 1179, 1184 (7th Cir. 1982) (§ 1985); Estes-El v. State Dep't of Motor Vehicles Office of Administrative Adjudication Traffic Violation Bureau, 1997 WL 342481, *3 (S.D.N.Y. June 23, 1997) (same); Boykin v. Bloomsburg Univ. of Pa., 893 F. Supp. 378, 394 (M.D. Pa. 1995) (§§ 1983 and 1985), aff'd, 91 F.3d 122 (3d Cir. 1996), cert. denied sub nom Mirin v. Eyerly, 519 U.S. 1078 (1997); Dolin on behalf of N.D. v. West, 22 F. Supp. 2d 1343, 1350 (M.D. Fla. 1998) (§§ 1983 and 13981). Plaintiff is seeking only monetary damages.

Congress also has not abrogated the states' Eleventh Amendment immunity as to state-law claims. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984); Randolph v. Rodgers, 170 F.3d 850, 859 (8th Cir. 1999) (Eleventh Amendment precludes federal court from ordering state officials to conform their conduct to state law); Mascheroni v. Bd. of Regents of Univ. of Calif., 28 F.3d 1554, 1560 (10th Cir. 1994); Blake v.

Papadakos, 953 F.2d 68, 73 n.5 (3d Cir. 1992) ("federal courts have no jurisdiction to review state officials' compliance with state law").

2. Sovereign immunity

Defendants Barone and Zappan also assert that the doctrine of sovereign immunity bars plaintiff's state-law claims against them in their individual capacities. The doctrine of sovereign immunity bars damage claims for state-law torts against employees of Commonwealth agencies acting within the scope of their duties, except for several narrow enumerated exceptions. See 1 Pa. C.S.A. § 2310; 42 Pa. C.S.A. § 8522; Tinson v. Commonwealth, 1995 WL 581978, *7 (E.D. Pa. Oct. 2, 1995); Holt v. Northwest Pa. Training Partnership Consortium, Inc., 694 A.2d 1134, 1140 (Pa. Commw. 1997); La Frankie v. Miklich, 618 A.2d 1145, 1149 (Pa. Commw. 1992) (en banc); Yakowicz v. McDermott, 548 A.2d 1330, 1332-33 (Pa. Commw. 1988), appeal denied, 565 A.2d 1168 (Pa. 1989).

Sovereign immunity applies to intentional and negligent torts. See Pierce v. Montgomery County Opportunity Board, Inc., 884 F. Supp. 965, 972 (E.D. Pa. 1995) (intentional torts); Shoop v. Dauphin County, 766 F. Supp. 1327, 1334 (M.D. Pa.), aff'd, 945 F.2d 396 (3d Cir. 1991), cert. denied sub nom Shroy v. Shoop, 502 U.S. 1097 (1992); Holt, 694 A.2d at 1140 (intentional torts including intentional infliction of emotional distress); La

Frankie, 618 A.2d at 1149; Bufford v. Pa. Dep't of Transp., 670 A.2d 751, 753 (Pa. Commw. 1996) (Commonwealth agency employees not liable for negligent acts except those within enumerated statutory exceptions); Clark v. Southeastern Pennsylvania Transp. Auth., 691 A.2d 988, 992 (Pa. Commw.) (failure to train or properly supervise subordinate not within enumerated exceptions to sovereign immunity), appeal denied, 704 A.2d 640 (Pa. 1997).

Sovereign immunity applies to claims asserted against Commonwealth officials in their individual capacities. Unlike employees of municipal agencies who remain liable for intentional torts, see Illiano v. Clay Tp., 892 F. Supp. 117, 121-22 (E.D. Pa. 1995), employees of Commonwealth agencies are immune from liability even for intentional torts. See La Frankie, 618 A.2d at 1149 (abrogating prior holding that employee of Board of Probation and Parole could be liable for acts which constituted "willful misconduct").

None of the narrow enumerated exceptions to sovereign immunity -- vehicle liability, medical-professional liability, liability arising from the Commonwealth's control of personal property, real property or animals, liability relating to state liquor store sales, the National Guard or toxoids or vaccines -- apply in the instant case. See 42 Pa. C.S.A. § 8522(b).

3. Qualified immunity

Defendants also assert qualified immunity. Government

officials performing discretionary functions generally are entitled to qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." See Wilson v. Lane, 119 S. Ct. 1692, 1696 (1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Rouse v. Plantier, --- F.3d ---, 1999 WL 432594, *4 (3d Cir. June 29, 1999); In re City of Philadelphia Litig., 158 F.3d 711, 716 (3d Cir. 1998).

The Eighth Amendment right of a convicted prisoner not to be sexually assaulted by a guard and the due process right to freedom from invasion of bodily integrity were clearly established rights of which a reasonable official would have known in 1995. See Hovater v. Robinson, 1 F.3d 1063, 1068 (10th Cir. 1993) (prisoner has constitutional right to be secure in her bodily integrity and free from attack by guards); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 726 (3d Cir. 1989), cert. denied sub nom Smith v. Stoneking, 493 U.S. 1044 (1990). See also Sutton v. Utah State School for Deaf and Blind, 173 F.3d 1226, 1241 (10th Cir. 1999) (clearly established in 1995 that state supervisor may be liable for failing to take appropriate steps to prevent sexual assaults by subordinates on persons for whose safety state was responsible); Butler v. Dowd, 979 F.2d 661, 675 (8th Cir. 1992) (en banc) (prisoners have clearly

established constitutional right to be free of sexual attacks of which a reasonable prison official would be aware).

Insofar as the evidence would permit a finding that Mr. Barone and Mr. Zappan were deliberately indifferent to a risk that Mr. Oslick would sexually assault female parolees with whom he came into contact, these defendants would not be entitled to qualified immunity.

B. Prison Litigation Reform Act

Defendants Barone and Zappan also assert that plaintiff's claims are barred by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e. Among other things, the PLRA bars "prisoners" from bringing actions in federal court for mental or emotional injuries suffered in custody without a prior showing of physical injury. See 42 U.S.C. § 1997e(e). A "prisoner" for PLRA purposes is a person who is incarcerated or detained at the time he files suit. See Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (§ 1997e(e) does not apply to felon who is no longer incarcerated); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999) (per curiam) (administrative exhaustion requirement of § 1997e(a) does not apply to prisoners who file suit after release from confinement); Doe, by and through Doe v. Washington County, 150 F.3d 920, 924 (8th Cir. 1998) (§ 1997e(d) limitation on attorney fees not applicable to plaintiffs who are not "prisoners" when they file suit).

Defendants have produced no evidence to show that plaintiff was incarcerated or detained when she initiated this action. It appears from plaintiff's complaint that at the time she initiated this action she was residing in Germantown, a residential section of Philadelphia which has no prison facility.

C. Plaintiff's claims

1. § 1983 claims

Plaintiff has asserted claims under § 1983 against defendants Barone and Zappan for "failure to protect" her and for depriving her of the Eighth Amendment right to be free from cruel and unusual punishment, of the Fourteenth Amendment right to equal protection and of unspecified "liberty interests."[2]

A supervisor is liable for a constitutional violation committed by a subordinate only if the supervisor participated in the violation or directed, encouraged, condoned or knowingly

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[2] Plaintiffs argue that Messrs. Barone and Zappan are liable under the "state-created danger" theory. The "state-created danger" doctrine is used to attribute to the state a duty to protect persons in circumstances in which there otherwise is no duty. See Kneipp v. Teider, 95 F.3d 1199, 1211 (3d Cir. 1996). It is an exception to the general rule that the due process clause does not impose a duty on the state to protect the safety and security of the citizenry. Resort to such an exception obviously is unnecessary with regard to persons in state custody to whom the state clearly owes a duty to protect. See DeShaney v. Winnegabo County Dept. of Social Svces., 489 U.S. 189, 199-200 ("when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"); Young v. Quinlan, 960 F.2d 351, 362 (3d Cir. 1992).

acquiesced in the subordinate's actions. See Baker v. Monroe Twp., 50 F.3d 1186, 1190-91 & n.1 (3d Cir. 1995). The supervisor must have acted with deliberate indifference to the constitutional rights of persons with whom the subordinate came into contact. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453-54 (5th Cir.) (same deliberate indifference standard applicable to municipalities applies to supervisory liability under § 1983), cert. denied sub nom Lankford v. Doe, 513 U.S. 815 (1994); Sample v. Diecks, 885 F.2d 1099, 1117-18 (3d Cir. 1989) (same).

A "failure to train may amount to deliberate indifference where the need for more or different training is obvious, and inadequacy very likely to result in violation of constitutional rights." Carter v. City of Philadelphia, --- F.3d ---, 1999 WL 250771, *13 (3d Cir. Apr. 28, 1999). The "need for more or different training [must have been] so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that the pertinent policy maker or supervisor could "reasonably be said to have been deliberately indifferent to the need." City of Canton, Ohio v. Harris, 489 U.S. 378, 390 (1989); Mark v. Borough of Hatboro, 51 F.3d 1137, 1154 (3d Cir.), 516 U.S. 858 (1995); Faulcon v. City of Philadelphia, 18 F. Supp. 2d 537, 543 (E.D. Pa. 1998). A supervisor is liable for failing properly to train or control a subordinate only if the supervisor

knew contemporaneously of the offending incident or knew of a prior pattern of similar incidents or circumstances and acted in such a manner as reasonably could be found to communicate a message of approval to the subordinate. See Montgomery v. De Simone, 159 F.3d 120, 126-27 (3d Cir. 1998).

Plaintiff has not shown and does not contend that Mr. Barone or Mr. Zappan knew contemporaneously that Mr. Oslick was sexually assaulting plaintiff. They were not present.

Plaintiff contends that because of the 1993 incident in which Mr. Oslick dropped his pants while telling a male colleague to "kiss my ass" and the report by Mr. Sanchez of Mr. Oslick telling sexually explicit jokes to female parolees, Messrs. Barone and Zappan were "put on notice" that Mr. Oslick had "sexually-oriented problems." One cannot reasonably conclude from this evidence that Messrs. Barone and Zappan were deliberately indifferent to a risk that Mr. Oslick would physically assault a parolee. There is a very significant difference between sexually explicit jokes and obscene gestures, however unpalatable, and committing a felonious sexual assault. See 18 Pa. C.S.A. § 3125. The latter violates the Eighth Amendment and the due process right to bodily integrity. The former does not. See, e.g., Barney v. Pulsipher, 143 F.3d 1299, 1310-11 & n.1 (10th Cir. 1998) (verbal sexual harassment does not violate Eighth Amendment).

Moreover, there is no evidence that even this less egregious conduct was condoned. Mr. Oslick was formally reprimanded for "unprofessional and unacceptable" behavior and warned that any further such incidents would result in more severe disciplinary action. One simply cannot reasonably conclude that Mr. Barone, Mr. Zappan or any supervisor approved of or tacitly encouraged acts of sexual assault, or that there was an obvious need to train or instruct Mr. Oslick, a retired Philadelphia police officer, that sexually assaulting a female parole violator in his custody was improper and illegal.

Moreover, a supervisor can be held liable for failing adequately to train a subordinate only if the deficiency actually caused the plaintiff's injury. See Reitz v. County of Bucks, 125 F.3d 139, 144 (3d Cir. 1997). There has been no showing that Mr. Oslick's conduct resulted from any failure to train him or indeed that he did not already appreciate the impropriety of the type of conduct alleged. In denying plaintiff's allegations when questioned by state investigators, Mr. Oslick acknowledged such awareness with his colloquial response "I may be stupid but I'm not crazy."[3]

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[3] Insofar as plaintiff appears to argue that § 1983 liability may be predicated on the failure of Mr. Barone or Mr. Zappan to ensure that a female agent accompanied plaintiff and the other female prisoners, the argument is unavailing. See Hovater, 1 F.3d 1066-68 & n.4 (no constitutional right of prisoner to guard of same gender and failure to adhere to policy that female officer, if available, should escort female prisoners will not sustain § 1983 liability).

From the competent evidence of record, one cannot reasonably conclude that Mr. Zappan or Mr. Barone acted with deliberate indifference to plaintiff's right not to be sexually assaulted by Mr. Oslick.

2. § 1985 claim

To sustain a § 1985(3) claim, a plaintiff must produce evidence from which a reasonable factfinder could find the existence of a conspiracy for the purpose of depriving a person or class of persons of equal protection of the laws or equal privileges and immunities, and an act in furtherance of the conspiracy whereby a party was injured in his person or property or was deprived of a right or privilege of a citizen of the United States. See United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott, 463 U.S. 825, 829 (1983); Ridgewood Bd. of Educ., 172 F.3d at 253-54.

Defendants Barone and Zappan correctly suggest "the record contains absolutely no evidence of racial discrimination -- whether individually-directed or class-based in nature" on their part. Courts, however, have held that § 1985(3) also provides a remedy for discrimination on the basis of gender. See Lyes v. City of Riviera Beach, Fla., 166 F.3d 1332, 1336 (11th Cir. 1999) (en banc); Libertad v. Welch, 53 F.3d 428, 448-49 (1st Cir. 1995); Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 224 (6th Cir. 1991); National Org. For Women v.

Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990), rev'd in part and vacated in part on other grounds sub nom Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993); New York State Nat'l Org. For Women v. Terry, 886 F.2d 1339, 1359 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988); Novotny v. Great American Federal Savings & Loan Ass'n, 584 F.2d 1235, 1243 (3d Cir. 1978) (en banc), vacated on other grounds, 442 U.S. 366 (1979); Valanzuela v. Snider, 889 F. Supp. 1409, 1420 (D.N.M. 1995); Larson v. School Bd. of Pinellas County, Fla., 820 F. Supp. 596, 602 (M.D. Fla. 1993); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 942 (D. Neb.), aff'd, 834 F.2d 697 (8th Cir. 1986).

Plaintiff asserts that unspecified evidence suggests that the defendants participated in a "conspiracy of silence" by allowing Mr. Oslick to interact with female prisoners despite knowing that he had a propensity for engaging in sexually inappropriate behavior.

The requisite agreement or "meeting of the minds" by defendants to violate a person's civil rights may be tacit and need not be proved by direct evidence. To withstand summary judgment on a § 1985(3) claim, however, a plaintiff must produce evidence which would permit a reasonable factfinder to conclude that the alleged conspirators shared "the general conspiratorial objective [and] that there was a single plan, the essential

nature and general scope of which [was] known to each person who is to be held responsible for its consequences." Simmons v. Poe, 47 F.3d 1370, 1378 (4th Cir. 1995) (quoting Lenard v. Argento, 699 F.2d 874, 882-83 (7th Cir. 1983), cert. denied, 464 U.S. 815 (1983)). From the competent evidence of record, one cannot reasonably conclude that Mr. Barone or Mr. Zappan shared with Mr. Oslick the objective of sexually harassing or assaulting plaintiff or any other parolee because of gender, race or any other motivation.

3. § 13981 claim

The Violence Against Women Act (VAWA) establishes a "right to be free from crimes of violence motivated by gender." See 42 U.S.C. § 13981(b). It provides a cause of action against a person "who commits a crime of violence motivated by gender and thus deprives another of the right." See 42 U.S.C. § 13981(c); Doe v. Hartz, 134 F.3d 1339, 1341 (8th Cir. 1998).

The VAWA defines "crime of violence" in pertinent part as "an act or series of acts that would constitute a felony against the person" and which "would come within the meaning of State of Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges." See 42 U.S.C. § 13981(d)(2)(A). Title 18 U.S.C. § 16 defines a "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of

> physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Two courts have held that the civil remedy provision of the VAWA is unconstitutional. See Brzonkala v. Virginia Polytechnic Institute and State Univ., 169 F.3d 820, 889 (4th Cir. 1999) (en banc); Bergeron v. Bergeron, --- F. Supp. 2d ---, 1999 WL 355954, *12 (M.D. La. May 28, 1999). The other courts which have addressed the issue, however, have found it constitutional. See, e.g., Ericson v. Syracuse Univ., --- F. Supp. 2d --- 1999 WL 212684, *4 (S.D.N.Y. Apr. 13, 1999) (declining to follow Brzonkala and holding that civil remedy provision of VAWA is constitutional); Doe v. Mercer, 37 F. Supp. 2d 64, 66 (D. Mass. 1999); Liu v. Striuli, 36 F. Supp. 2d 452, 476 (D.R.I. 1999); Mattison v. Click Corp. of America, Inc., 1998 WL 32597, *6 (E.D. Pa. Jan. 27, 1998); Ziegler v. Ziegler, 28 F. Supp. 2d 601, 607-617 (E.D. Wash. 1998); Doe v. Hartz, 970 F. Supp. 1375, 1423 (N.D. Iowa 1997), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1997); Ansimov v. Lake, 982 F. Supp. 531, 540 (N.D. Ill. 1997) (VAWA civil remedies provision is constitutional even if not "the only or even the best method available to Congress to protect the victims of gender-motivated violence");

Seaton v. Seaton, 971 F. Supp. 1188, 1193 (E.D. Tenn. 1997) (Congress had rational basis for determining that violence against women sufficiently affects interstate commerce); Crisonino v. New York City Housing Auth., 985 F. Supp. 385, 396-97 (S.D.N.Y. 1997); Doe v. Doe, 929 F. Supp. 608, 617 (D. Conn. 1996). In any event, none of the parties have questioned the constitutionality of the Act.

Accepting that Mr. Oslick committed a "felony" which was a "crime of violence" and assuming that persons can be liable under the VAWA for tacitly aiding or encouraging the commission of such a crime, one cannot reasonably find from the competent evidence of record that Mr. Barone or Mr. Zappan aided or encouraged Mr. Oslick in assaulting plaintiff. As noted, there is a significant difference between knowledge that a person has engaged in crude behavior and understanding that he is likely commit a physical sexual assault. It would be quite extraordinary to assume from the making of an obscene gesture or the telling of an unwelcome off-color joke, however opprobrious, that the offending party would likely proceed to engage in a physical assault or sexual molestation.

V. Conclusion

Plaintiff's claims against defendants Barone and Zappan in their official capacities are barred by the Eleventh Amendment. Plaintiff's state-law claims against defendants

Barone and Zappan in their individual capacities are barred by sovereign immunity. Plaintiff has failed to produce evidence from which a factfinder reasonably could conclude that defendant Zappan or Barone was deliberately indifferent to plaintiff's constitutional right not to be sexually assaulted or that they encouraged, condoned or conspired to further any such conduct. Plaintiff has not sustained her §§ 1983, 1985(3) or 13981 claims against these defendants.

Accordingly defendants' motion will be granted. An appropriate order will be entered.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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O R D E R

AND NOW, this day of July, 1999, upon consideration of the Motion of Defendants Zappan and Barone for Summary Judgment (Doc. #19) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**.

BY THE COURT:

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JAY C. WALDMAN, J.